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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1918.

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**No. 258**

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PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,  
*Appellant,*

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF  
THE CALUMET DITCH,  
*Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
DISTRICT OF INDIANA.

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**BRIEF AND ARGUMENT FOR APPELLANT**

TOGETHER WITH AN APPENDIX CONTAINING, FOR CON-  
VENIENCE OF REFERENCE, CERTAIN STATUTES AND  
QUOTATIONS FROM DECISIONS.

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## SUBJECT INDEX.

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	Page.
Question involved .....	1-2
How question is presented.....	2
Statement of facts .....	3-5
Specification of error .....	5
 Points:	
Sole question one of jurisdiction.....	6
Construction of ditch not a judicial proceeding and therefore enjoinable by a federal court.....	6
Since Appellee represents landowners benefited he may be enjoined from obtaining for them benefit of a decree void as against Appellant.....	7-8
 Argument:	
Sole question one of jurisdiction .....	9
Construction of ditch not a judicial proceeding.....	9-12
Distinction between acts of judicial body which are judicial, and acts which are legislative, executive or administrative..	12-13
Legislative, executive or administrative acts, by whomsoever performed, may be enjoined by a federal court.....	14
The decree establishing the ditch is not a judicial, but a legislative act .....	15-16
The case is not parallel to a case of enjoining a sheriff from executing a decree of a State court.....	16-17
The case is parallel to Prentis v. Atlantic Coast Line.....	17-18
After entry of decree establishing ditch Appellee alone could be enjoined .....	19-24
Not having been a party to the drainage proceeding Appellant could attack the decree collaterally.....	24-26
Appellant was not bound to intervene in the State court pro- ceedings . . . . .	26-27
Appellee may be enjoined, although an agent of the State....	27
Synopsis of Indiana Drainage Act of 1907.....	29-36
Indiana Drainage Act of 1907 (in full).....	53-84

LIST OF CASES CITED.

Arrowsmith v. Gleason, 129 U. S., 86, 98-101.....	8, 22
Board of Commissioners v. Jarnecke, 164 Ind., 658; 74 N. E., 520.7, 20-21	
Carter v. Buller, 159 Ind., 52; 64 N. E., 667.....	7, 21
Chicago & Erie R. R. Co. v. Luddington, 175 Ind., 35; 91 N. E., 939 . . . . .	16
Colorado-Eastern Ry. Co. v. Chicago, Burlington & Quincy Ry. Co., 141 Fed., 898.....	8, 25-26
Crapo v. Hazelgreen, 93 Fed., 316.....	7, 18-19
Delaware, Lackawanna & Western R. R. Co. v. Stevens, 172 Fed., 595, 608-610 . . . . .	7, 19
Ex parte Young, 209 U. S., 123, 150, 155.....	27
Furness v. Brummitt, 48 Ind. App., 442; 95 N. E., 1114.....	7, 20
Greene v. Louisville & Interurban R. R. Co., 244 U. S., 499, 506-7..	27
Hunt v. New York Cotton Exchange, 205 U. S., 322.....	8, 22, 47-49
Louisville & Nashville R. R. Co. v. Garrett, 231 U. S., 298..... . . . . .	7, 13, 15, 40-42
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S., 239, 253 . . . . .	23, 49-52
Marshall v. Holmes, 141 U. S., 589, 596-600.....	8, 22
McCullum v. Uhl, 128 Ind., 304; 27 N. E., 152.....	24-25
McNeill v. Southern Ry. Co., 202 U. S., 543.....	7, 13
Mexican Central Ry. Co. v. Eckman, 187 U. S., 429, 432.....	6
Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S., 335, 341.....	7, 13, 39-40
Perkins v. Haywood, 132 Ind., 95; 31 N. E., 670.....	11
Prentis v. Atlantic Coast Line, 211 U. S., 210, 225-7....	6, 13, 17, 36-39
Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362.....	25
Simon v. Southern Ry. Co., 236 U. S., 115, 121.....	6, 8, 9, 22, 42-47
Smyth v. Ames, 169 U. S., 466, 516-19.....	8, 25, 27
Southern Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed., 82, 94..	7, 13, 42
Terre Haute v. Evansville & Terre Haute R. R. Co., 149 Ind., 174; 46 N. E., 77.....	15
Venner v. Great Northern Ry. Co., 209 U. S., 24, 30.....	6
Wabash Ry. Co. v. Todd, 186 Ind., 72; 113 N. E., 907.....	12
Well v. Calhoun, 25 Fed., 865, 870-1.....	7
Western Union Telegraph Co. v. Myatt, 98 Fed., 335, 342, 346-7 355, 360-1 . . . . .	7, 19

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STATEMENT OF THE CASE.

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QUESTION INVOLVED.

The sole question presented in this case is one of federal jurisdiction.

Has a citizen of one state, whose business and property are located within that state upon an interstate stream, no remedy in a federal court against an invasion of his property rights in that state resulting from the diversion in an adjoining state of the waters of such stream from their normal flow to an entirely different course by means of a drainage ditch to be constructed in the adjoining

ing state pursuant to proceedings of a state court of such adjoining state to which proceedings he is not a party?

In other words, does Section 265 of the Judicial Code of the United States prevent Appellant, an Illinois citizen, whose property and business are located in that State upon the Little Calumet River, from obtaining relief by injunction in a federal court from the construction of a drainage ditch in Indiana by Appellee, an Indiana Drainage Commissioner appointed by the Circuit Court of Porter County in a proceeding to which Appellant was not a party, the operation of which ditch will divert in a wholly different direction in Indiana the flow of water in the Little Calumet River and will irreparably damage Appellant's property in Illinois?

The question is raised upon an appeal by Appellant from a decree of the District Court of the United States for the District of Indiana, dismissing upon motion of Appellee, for want of jurisdiction, Appellant's bill of complaint on the ground that it appeared to the court that the relief prayed in the bill was not allowable under the provisions of Section 265 of the Judicial Code of the United States. (Trans., 42.) In his certificate, Anderson, District Judge, stated the question as follows (Trans., 47):

"whether the District Court of the United States has jurisdiction, in view of the provisions of Section 265 of the Judicial Code of the United States, to enjoin a Drainage Commissioner, appointed by the Circuit Court of Porter County in the State of Indiana in a drainage proceeding instituted under the drainage laws of said State, from constructing in Indiana a drainage ditch which would so divert from its natural course the flow of water in a river arising in and flowing from the State of Indiana into the State of Illinois, that irreparable injury and damage would be sustained by a riparian owner of land situated on said river in the State of Illinois, which was lawfully using the waters of such river, such owner not having been made a party to said

drainage proceedings in the Circuit Court of Porter County."

#### STATEMENT OF FACTS.

The facts alleged in the bill of complaint are as follows:

Appellant is a public utility corporation organized under the laws of the State of Illinois and a citizen of that State, and is engaged in the business of producing, selling and distributing electrical energy, gas and steam in Illinois. One of its electrical generating stations is located upon land owned by it upon the Little Calumet River near Blue Island, in Cook County, Illinois, and is operated by steam power. The land so owned extends underneath and to the center of the river. As a riparian owner Appellant is entitled, under the law of Illinois, to the use of the water in the river for the operation of its plant. (Trans., 2-6.)

It is absolutely essential for the efficient and economical operation of this station that the existing velocity of flow and volume of water in the river at the station continue as at present in order that a sufficient quantity of water for cooling purposes may be available. If the velocity of flow and volume of water in the river should be materially lessened, the usefulness of the water in the river for cooling purposes will be destroyed. (Trans., 7-8.)

The Little Calumet River rises in Laporte County, Indiana, and flows westerly across Porter and Lake Counties into Cook County, Illinois, where it passes the station and then joins the Grand Calumet River, which flows into Lake Michigan at South Chicago, Illinois. The river affords the only sufficient supply of water in the locality in which the station is located for the operation of a large, modern, steam-driven, electrical power station with suitable railroad connections. (Trans., 9-10.)

During the October term, 1908, there was instituted in the Circuit Court of Porter County, Indiana, under the Drainage Act passed by the Legislature of Indiana on March 11, 1907, a proceeding to establish and construct in that county a ditch to extend from the Little Calumet River in a northerly direction to Lake Michigan. A final decree was entered in that proceeding on March 22, 1911, ordering that the ditch be established and constructed. Thereafter, on April 21, 1914, upon appeal to the Supreme Court of Indiana, the decree was affirmed, and thereafter, on January 8, 1917, upon writ of error to the Supreme Court of the State of Indiana, the judgment of that court was affirmed by this Court. Appellant is not now and never has been a party to that proceeding. (Trans., 10-11.) The decision of the Supreme Court of Indiana is reported in 182 Ind., 178; 104 N. E., 975, and upon rehearing in 182 Ind., 178; 105 N. E., 905 and the decision of this Court is reported in 242 U. S., 375.

More than one-half of the volume of water normally and naturally flowing down the Little Calumet River by Appellant's station will be diverted into the proposed ditch, which will result in reducing by more than one-half the generating capacity of the station during the dry season of the year. In such event the supplying of electrical energy by Appellant from its station will be greatly restricted and Appellant will thereby sustain great and irreparable injury largely exceeding \$3,000 in amount. (Trans., 12-13.)

Under the decree establishing the ditch, Appellee, who is a citizen of the State of Indiana and a resident of Porter County, was appointed Commissioner for the construction of the ditch, and is now acting as such Commissioner, and proposes to proceed with the construction and completion of the ditch. No portion of the ditch has yet been constructed. (Trans., 13.)

Appellant alleged that the construction and main-



tenance of this ditch and the alteration and diversion thereby of the flow of water in the river, and the decree of the Circuit Court of Porter County authorizing such construction and maintenance of the ditch and such alteration and diversion of the flow of water in the river, and the Drainage Act itself to the extent that it authorizes such construction and maintenance of the ditch and such alteration and diversion of the flow of water in the river, all deprived Appellant of its property without due process of law and were in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and for that reason were illegal and void. (Trans., 14.)

Appellant prayed that an injunction be issued restraining Appellee from constructing and maintaining the ditch. (Trans., 16.)

Attached to the bill of complaint is a blue print showing the drainage area affected by the proposed ditch. (Trans., 17.)

Appellee filed an answer raising issues of fact and in conclusion moved to dismiss the bill for want of equity. (Trans., 33.) Without passing upon the merits of the bill, the District Court dismissed the bill for want of jurisdiction. (Trans., 42.)

In an indexed Appendix immediately following the argument will be found a synopsis of the Drainage Act of 1907, under which this proceeding was instituted, quotations from decisions and the Drainage Act in full, to which reference will be made in the course of the argument. The Act will be found in the Indiana Acts of 1907, pages 502-537.

#### SPECIFICATION OF ERROR.

Appellant specified as error the action of the District Court in adjudging and decreeing the dismissal of Appellant's bill for want of jurisdiction as certified by the district judge. (Trans., 43.)

POINTS.

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## I.

The sole question for the consideration of this Court is one of jurisdiction.

Sec. 238 of the Judicial Code (U. S. Compiled Statutes, 1916, Vol. 2, Sec. 1215).

*Mexican Central Ry. Co. v. Eckman*, 187 U. S., 429, 432.

*Venner v. Great Northern Ry. Co.*, 209 U. S., 24, 30.

*Simon v. Southern Ry. Co.*, 236 U. S., 115, 121.

## II.

The construction of the Burns ditch, whether such construction be considered an act of the Circuit Court of Porter County or an act of the Drainage Commissioner as an agent of the State, is not a *judicial proceeding* within the meaning of Section 265, but is merely a legislative, executive or administrative act, and as such may be enjoined by a federal court.

The distinction between proceedings judicial and proceedings legislative, executive or administrative, although taking place in a body, which in its principal aspect is a court, has been repeatedly recognized by this Court in construing Section 265 of the Judicial Code. Proceedings which are legislative, executive or administrative in character, although taken in a State court, may be enjoined by a federal court.

*Prentis v. Atlantic Coast Line*, 211 U. S., 210, 225-7.

- Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U. S., 335, 341.  
*Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S., 298.  
*Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed., 82, 94; affirmed in *McNeill v. Southern Ry. Co.*, 202 U. S., 543.  
*Crapo v. Hazelgreen*, 93 Fed., 316.  
*Delaware, Lackawanna & Western R. R. Co. v. Stevens*, 172 Fed., 595, 608-10.  
*Western Union Telegraph Co. v. Myatt*, 98 Fed., 335, 342, 346-7, 355, 360-1.  
*Weil v. Calhoun*, 25 Fed., 865, 870-1.

### III.

After the entry of the final decree of the State court establishing the ditch, confirming the assessments and assigning the construction of the ditch to a drainage commissioner, the proceedings passed beyond the control of the original petitioning landowners, who thereafter had no right or authority either to dismiss the petition or abandon the proposed improvements. *Appellee then stood for and represented such landowners.* Any collateral attack thereafter upon the ditch proceeding may not be brought against the original petitioners but must be brought against such commissioner.

*Board of Commissioners v. Jarnecke*, 164 Ind., 658; 74 N. E., 520.

*Furness v. Brummitt*, 48 Ind. App., 442; 95 N. E., 1114.

*Carter v. Buller*, 159 Ind., 52; 64 N. E., 667.

The drainage proceeding was in fact a suit of a private character for the special benefit of the owners of the

lands proposed to be drained who are now represented by Appellee. Although Appellant because of the State practice may not directly enjoin such owners from obtaining the benefit of the decree establishing the ditch, nevertheless, it should not for that reason be deprived of all relief in a federal court. Since Appellee stood for and represented the owners of the lands proposed to be drained, Appellant's bill against him was in substance and effect merely a bill *to enjoin him from obtaining for such owners* the benefit of a decree affecting the property of Appellant, which was void as against Appellant for want of jurisdiction, and the District Court should have retained jurisdiction of the bill.

*Simon v. Southern Ry. Co.*, 236 U. S., 115.

*Hunt v. New York Cotton Exchange*, 205 U. S., 322.

*Colorado-Eastern Ry. Co. v. Chicago, Burlington & Quincy Ry. Co.*, 141 Fed., 898.

*Marshall v. Holmes*, 141 U. S., 589, 596-600.

*Smyth v. Ames*, 169 U. S., 466, 516.

*Arrowsmith v. Gleason*, 129 U. S., 86, 98-101.

ARGUMENT.

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## POINT I.

Under Section 238 of the Judicial Code and the decisions of this Court above cited, the only issue presented in this case is one of jurisdiction,—whether a federal court has jurisdiction to enjoin a drainage commissioner appointed by a State court under the Indiana Drainage Act from constructing a drainage ditch, the operation of which would cause irreparable injury and damage to the property of a citizen of another State located outside of the State of Indiana who was not a party to the drainage proceeding.

The question of jurisdiction must be determined by considering the allegations of the bill.

*Simon v. Southern Ry. Co.*, 236 U. S., 115, 121.

## POINT II.

Section 265 of the Judicial Code of the United States (Section 720 prior to the code revision of 1911) reads as follows:

“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

Appellant contends that the construction of the Burns Ditch is not a *judicial proceeding* within the meaning of the foregoing Section, but is merely a legislative, executive or administrative act even though performed by a State Court, and as such should have been enjoined by the District Court.

Irrespective of any statute the act of constructing the Burns Ditch is in no sense judicial. Such an act alters existing conditions and creates new ones. The flow of water in its natural course down the Little Calumet River will be diverted in an entirely different direction, and the lawful uses of such flow and of the water itself by riparian owners along the river will be taken away. It cannot be denied that the act of constructing this ditch completely changes existing conditions in many respects. Is the act of constructing the ditch in the slightest degree *judicial in nature*? Are any of the elements of a *judicial proceeding* to be found in the performance of this act? In our view the answer to all these questions must be in the negative. The act is distinctively a legislative, executive or administrative act of a representative of the State whether such representative be the Drainage Commissioner or the Circuit Court of Porter County.

We submit to the Court in the Appendix, pages 29-36 a brief analysis of the Indiana Drainage Act of 1907, under which the proceeding establishing the Burns Ditch was instituted. The Act is printed in full in the Appendix, pages 53-84. That analysis discloses that the machinery provided for drainage proceedings is primarily legislative and executive or administrative. The preliminary steps are taken by the drainage commissioners; then follow the judicial proceedings determining the rights of parties who will be benefited or affected by the operation of the ditch; then follows the decree establishing the ditch, and then follow the various acts of the construction commissioner who collects the assessments and performs and pays for the work. The first and third of these steps are legislative in character. The fourth is distinctly executive or administrative in character. The only step in the whole drainage proceeding which can be

said to be judicial in nature is that in which the court adjudicates the rights of the parties who will be affected by the proposed ditch. That step involves the bringing in of all parties interested, the ascertainment of the amount which each property owner should receive as compensation for lands and rights taken, and the proportionate share of the total cost which each property owner should bear. It relates to matters in which antagonistic interests are involved and upon which a judicial determination is necessary. It involves acts peculiarly judicial in character such as are properly within the jurisdiction of a court. But the judicial feature of the drainage proceeding ends as soon as the decree establishing the ditch is entered.

In *Perkins v. Haywood*, 132 Ind., 95, 31 N. E., 670, the Supreme Court of Indiana had under consideration the Drainage Act of 1881, which was similar in many respects to the act of 1907, and in the course of its opinion the court said:

“The drainage law, under which these proceedings were had, contemplates that, after judgment has been rendered by the court establishing a ditch and ordering its construction, the case shall still remain upon the docket of the court while the ditch is in process of construction. The ditch commissioner, to whose supervision the work is intrusted, acts throughout under direction of the court. Section 4279, Rev. St. 1881. Only when he reports showing the work done does it finally disappear from the docket. *It does not follow, however, that the entire proceeding is in fieri during all of this time.* The statute contemplates adversary proceeding. Provision is made for bringing before the court all persons interested in or affected by the work. Issues may be formed and tried, as was done in this case. *But the judgment establishing the ditch, and ordering its construction, is a final judgment, which terminates the adversary proceedings.* It is thereafter on the docket only for the purpose of carrying into

effect the judgment actually rendered, and not for any action modifying or changing that judgment. *So far, therefore, as the adversary proceedings are concerned, it is no longer in fieri after the expiration of the term when the judgment was rendered.*" (Italics ours.)

Again in *Wabash Ry. Co. v. Todd*, 186 Ind., 72, 113 N. E., 997, involving a construction of the Act of 1907, the Supreme Court said:

"The judgment which established the drain and ordered its construction, was final in character, and terminated the adversary proceedings, but the action thereafter remained on the court docket for the purpose of carrying such judgment into effect, and to that extent, at least, the Circuit Court retained its original jurisdiction over the subject matter (*Perkins v. Haywood*, 132 Ind. 95, 99, 31 N. E. 670), and as Appellant voluntarily appeared and filed an answer to the petition herein, there can be no question as to the jurisdiction over the parties."

After the entry of the decree establishing the Burns Ditch an appeal was taken to the Supreme Court of Indiana where the decree was affirmed, and upon writ of error the decree was reviewed and affirmed by this Court. Thereafter the various steps to be taken by the construction commissioner are specifically designated by the statute and are distinctively executive or administrative in character. At the time the bill was filed by Appellant in the District Court there were no *adversary proceedings* pending in the State Court which Appellant sought to enjoin. Whatever steps remained for the completion of the Burns Ditch were executive or administrative in character whether to be performed by the Drainage Commission as an agent of the State, or as an agent of the court, or by the Circuit Court of Porter County itself.

This Court has frequently recognized the distinction between acts of a judicial body which are purely *judicial*



in character, and acts which are *legislative, executive or administrative* in character. The question has commonly arisen in cases in which the Court was called upon to construe a statute of a State which conferred upon its courts duties which were not only judicial, but also legislative in character.

In the cases involving these statutes it was contended that Section 265 of the Judicial Code prevented a federal court from enjoining such a State court from performing legislative acts as well as judicial acts. After careful consideration of the subject this Court held that "proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. Sec. 720, no matter what may be the general or dominant character of the body in which they may take place." The Court pointed out the distinction between *judicial* proceedings and *legislative* proceedings. It held that "a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." Whether a given act is judicial, or legislative, executive or administrative, depends upon "the nature of the final act."

Among the cases so considered by this Court are:

*Prentiss v. Atlantic Coast Line*, 211 U. S., 210.

*Mississippi Railroad Commission v. I. C. Railroad Co.*, 203 U. S., 335.

*Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S., 298.

*McNeill v. Southern Railway Co.*, 202 U. S., 543, affirming *Southern Railway Co. v. Greensboro Ice & Coal Co.*, 134 Fed., 82.

For the convenience of the Court we have set forth in the Appendix, pages 36-42, a brief synopsis of these cases with quotations from the opinions, to which the Court may refer if it desires.

The fundamental principle established by this Court, as announced in the foregoing cases, is that "the nature of the final act" must govern in determining whether such act, *by whomsoever performed*, may be enjoined by a federal court. If the nature of that act is *judicial*, the performance of it may not be enjoined by a federal court; but if the nature of that act is *legislative, executive or administrative*, the performance of it may be enjoined by a federal court *even though the act is performed by a judicial body*. Section 265 does not prevent a federal court from enjoining an act of a State court *if such act is not judicial in nature*.

The final act to be performed in the case before this Court is the *construction of a ditch*. There is nothing whatever judicial in character in such an act. It is purely and simply a legislative, executive or administrative act, whether performed by a court or by a drainage commissioner named by the court or elected by the people at any election.

While Section 7 of the Drainage Act (Appendix pp. 33 and 34, 70-71) provides that the drainage commissioner shall at all times be under the control and direction of the court and shall obey such directions, any directions so given by the court are not *judicial acts of the court*, nor is the court in giving such directions *acting in a judicial capacity*. The court will be acting solely in an executive or administrative capacity and will be performing executive or administrative acts, unless such directions are in the nature of a judicial determination of some issue arising between the drainage

commissioner and other parties. As was said by the Supreme Court of Indiana in *Terre Haute v. Evansville & Terre Haute R. R. Co.*, 149 Ind., 174, 46 N. E., 77:

"A judicial officer may, by authority of law, perform other than judicial acts; but when performed *they do not become judicial, because they were performed by a judicial officer.*" (Italics ours.)

As a matter of fact the entry of the decree establishing the ditch is in itself not a *judicial act*, but is a *legislative act*. It is the act of the State, through its judicial agency, declaring that the ditch should be constructed. The legislature might have passed an act establishing the ditch without the intervention of the judiciary, and such act would undeniably be a legislative act of the State. Or the State, through its legislature, may delegate to its judiciary the authority to establish the ditch, just as the legislature may delegate to its Railroad Commission authority to establish rates, but the act of the court in establishing the ditch, just as the act of the Railroad Commission in establishing rates, is still a *legislative act*, although performed by a court. As was said by this Court in *Louisville & Nashville R. R. Co. v. Garrett*, *supra*: "*It is 'the nature of the final act' that determines 'the nature of the previous inquiry.'*" The final act is the construction of the ditch. The nature of the previous inquiry leading up to the construction of the ditch is distinctly legislative. It involves the investigation and report of the Drainage Commissioners, reviewed by the circuit court, resulting finally in a decree establishing the ditch. All these steps, taken together, constitute a *legislative act* of representatives of the State, and in carrying the legislative act into effect the construction commissioner, in constructing the ditch, performs only executive or administrative acts of the State. The State, through its representatives, the Drainage Commissioners and the

court, legislates the ditch into existence, and the State, through its representative, the construction commissioner, builds the ditch. As was said by the Supreme Court of Indiana in *Chicago & Erie R. R. Co. v. Luddington*, 175 Ind., 35, 91 N. E., 939:

“The construction and repair of public ditches, under the laws of the state, like the establishment and improvement of public highways, is a public purpose, is a matter of state concern, and the exercise of a state function.”

In the commission rate cases before this Court above cited the railroad commissioners contended that their proceedings in fixing rates were proceedings of a court created by the legislature, and could not, therefore, be enjoined by a federal court because of the provisions of Section 720. This Court, however, held that the establishment of a rate was the making of a rule for the future and was, therefore, *an act legislative and not judicial in kind, and that proceedings legislative in nature were not proceedings in a court within the meaning of section 720, no matter what may have been the general or dominant character of the body in which they take place*. Whether such proceedings were judicial or legislative, depended *not upon the character of the body, but upon the character of the proceedings*. In this case the act of the circuit court in establishing the ditch was as much legislative in character, and the act of Appellee in building the ditch is as much executive and administrative in character, as in the cases before this Court the act of the railroad commissioner in fixing rates was legislative in character.

This is not a case of enjoining a sheriff from executing a decree of a State court. Such a decree adjudicates existing rights of parties and does not change conditions other than perhaps restoring conditions wrong-

fully changed by the defendant in the particular proceeding. This case deals with the creation of new conditions by legislative and executive action. A ditch is to be dug; water is to be diverted into the ditch; physical conditions over wide areas are changed; Appellant is deprived of its use of the flow of the stream past its plant; the State of Indiana, through its executive officer, the drainage commissioner, will deprive Appellant of its property without due process of law. To hold that these acts of Appellee are a *judicial proceeding* and therefore may not be enjoined by a federal court is to give Section 720 a construction never intended by Congress in its enactment, and a construction not recognized by this Court in its decisions above cited. The decree establishing the ditch was not a *judicial act*, it was a *legislative act* creating and providing for new conditions in the future. The act of Appellee in constructing the ditch is merely an *executive or administrative act* carrying into effect the previous *legislative act* establishing the ditch.

Counsel for Appellee may claim that the only relief which can be granted in this case by a federal court will be an injunction restraining the construction of the Burns' Ditch which the State court has ordered Appellee to construct, and that a conflict of authority will thereupon arise. Doubtless the same claim was made in the commission rate cases and notably the case of *Prentis v. Atlantic Coast Line*. There the Virginia court, called a railroad commission, had considered the respective claims of shippers and carriers and had finally decreed that a certain rate was reasonable and should thereafter be charged by carriers. That decree was as much a *decree of a court* as is the decree of the Circuit Court of Porter County establishing the Burns

Ditch. Both were the results of investigations of facts and both established new conditions for the future. What did this Court say to the claim of the Virginia commission that *its act in establishing the rate was a judicial proceeding* with which the federal court could not interfere? This Court in substance answered, "Your act, though the act of a court of a State, *is not a judicial act*. It is a legislative act and may, therefore, be enjoined by a federal court." Precisely the same answer should have been given by the court below to Appellee's contention in this case. The act of constructing the Burns Ditch, even though performed by the Circuit Court of Porter County, is not a *judicial act*, but merely an executive or administrative act, and may, therefore, be enjoined by a federal court. Both acts, the act establishing the new rate for the future and the act of constructing the Burns Ditch, create new conditions and alter existing conditions. Neither of those acts is in any sense judicial.

The mere fact that in the course of its investigation the Circuit Court of Porter County determined how much compensation should be paid to a property owner whose property would be affected by the proposed drainage, or how much a property owner would be benefited by the proposed drainage, and what proportion of the cost of the work must be borne by each, does not change in the slightest "the nature of the final act." The *final act* is still the *construction of the ditch*, and the *nature* of that act is *not judicial*.

The Court may be interested in reading an opinion of the Court of Appeals for the Seventh Circuit in the case of *Crapo v. Hazelgreen*, 93 Fed., 316, delivered by Woods, Circuit Judge, with whom sat Jenkins and Showalter, Circuit Judges, the latter not participating, however, in the opinion. The issue in

that case, so far as the jurisdictional question is concerned, was identical with the issue in this case. The court held that an injunction should be granted by a federal court to restrain a drainage commissioner from constructing a drainage ditch pursuant to proceedings of a State court of Indiana upon a bill of a landowner whose rights would be affected by the construction of the ditch, but who was not made a party to the drainage proceeding. Section 720 was not specifically referred to in the opinion, but it is hardly to be supposed that the Section was ignored or overlooked by the court in deciding the case.

There is also an interesting discussion of this general subject, and a review of the decisions of this Court by Ray, District Judge, in *Delaware, Lackawanna & Western Railroad Co. v. Stevens*, 172 Fed., 595, 607-10, and by Hook, District Judge, in *Western Union Telegraph Co. v. Myatt*, 98 Fed., 335, 342, 346-7, 355, 360-1.

### POINT III.

After the entry of the final decree of the Circuit Court of Porter County establishing the Burns' Ditch and assigning the execution of the construction of the ditch to Appellee, the proceedings passed beyond the control of the original petitioners and they had no right or authority under the law either to dismiss the petition or to abandon the proposed improvement or to control the proceedings in any manner whatsoever. The matter of constructing the ditch was then under the exclusive control and management of Appellee subject to the direction or order of the court. In any independent action to restrain such construction Appellee is the only proper party defendant.

In *Furness v. Brummitt*, 48 Ind. App., 442, 95 N. E., 1114, the owner of land affected by a proposed drainage ditch filed a bill to enjoin the commissioner and the original petitioning landowner from constructing the ditch pursuant to a decree of the court establishing such ditch, on the ground that the order was void. Before the hearing complainant dismissed the bill as to the drainage commissioner so that the only defendant was the petitioner in the drainage proceeding. The court held that the complainant, having been a party to the drainage proceeding, should have appealed from the decree establishing the ditch and could not obtain relief in an independent action in equity. In the course of the opinion, however, the court said:

“Furthermore, the ditch having been established and the commissioner appointed to construct it, *if any independent action could thereafter be maintained to enjoin its construction, the commissioner was the one to be enjoined*, for the case had by such orders passed beyond the control of the petitioners or other parties to the proceeding.” (Italics ours.)

In *Board of Commissioners v. Jarnecke*, 164 Ind., 658, 74 N. E., 520, the commissioners of Lake County, Indiana, tried to recover a money judgment for costs and expenses arising out of a proceeding instituted by the defendants in the circuit court of that county to establish a public ditch, the construction of which had been enjoined by a federal court. The court held that the appellees who originally instituted the drainage proceedings were not liable to the county for the costs and expenses thereby incurred. In the course of its opinion the court said:

“After the final order of the court establishing the ditch and confirming the assessments and assigning the execution of the construction to a commissioner, the proceedings *then passed beyond the control of the petitioners, and they had no right or au-*



thority under the law to either dismiss the petition or abandon the proposed improvement. It was then under the control and management of the commissioner, subject to the direction or order of the court. *Crume v. Wilson*, 104 Ind. 583, 4 N. E. 169. The proceedings thereafter in contemplation of the statute were to remain upon the docket of the court as an action pending therein until the construction of the ditch was finally completed. \* \* \* As previously stated, it appears that the petitioners, appellees herein, successfully prosecuted the proceedings instituted by them to a point where the court ordered the proposed work to be established, confirmed the assessments, and assigned the construction thereof to a commissioner, *who, when about to carry out the order of the court, was enjoined from further proceedings in the premises by the federal court.*" (Italics ours.)

In *Carter v. Buller*, 159 Ind., 52, 64 N. E., 667, certain items of the account of a drainage commissioner were objected to by interested landowners, and in discussing the relation existing between the drainage commissioner and such landowners, the court, speaking of the commissioner, said:

"He was appointed by the court to execute its order, and nothing more or less. He was the court's instrument *to construct for the landowners*, who were required to pay the cost, such a ditch as they requested and the court had ordered. He had no authority whatever to depart from the specific depths and dimensions prescribed in the report of the locating commissioners. *He stood for the landowners in contracting and in superintending the work*, and it was his plain duty to see that the contractor performed his agreement, and constructed the drain according to the plans and specifications which formed the basis of the contract." (Italics ours.)

From the foregoing cases it will be seen that Appellant could not maintain its bill in the District Court against the original petitioners who instituted the drainage pro-

ceeding. They passed out of the case upon the entry of the decree establishing the ditch, and thereafter they could exercise no control whatever over the proceeding or the construction work. *Appellee thereafter stood for and represented them in all matters pertaining to this ditch.* The drainage proceeding was primarily for the benefit of the landowners whose lands would be drained by the proposed ditch, and the benefits of the decree establishing the ditch were theirs.

This Court has held that a person whose property rights are affected by a decree entered in a proceeding to which he is not a party, may maintain a bill against the persons in whose favor such decree was entered to enjoin them from obtaining the benefits of their decree unlawful as against him.

*Simon v. Southern Ry. Co.*, 236 U. S., 115.

*Hunt v. New York Cotton Exchange*, 205 U. S., 322.

See also:

*Arrowsmith v. Gleason*, 129 U. S., 86, 98-101.

*Marshall v. Holmes*, 141 U. S., 589, 596-600.

We set forth in the Appendix, pages 42-49, a brief synopsis of the two cases first cited with quotations from the opinions.

If under the State practice the original petitioners in the Burns' Ditch proceeding were the parties who are now seeking to have executed the decree establishing the ditch, Appellant could have made such petitioners defendants to its bill in the District Court, and presumably, under the *Simon's* case above cited, the District Court would have enjoined such petitioners from enforcing their decree in the drainage proceeding to the injury of Appellant's property. Under its general

equity powers a District Court of the United States has jurisdiction, where the necessary diversity of citizenship and jurisdictional amount are involved, or constitutional questions are presented, to enjoin a party who has obtained a judgment void for fraud or want of jurisdiction from enforcing such judgment. We submit that Appellant should not be deprived of its right to relief in this case by action of the judiciary of the State of Indiana in holding on the one hand that Appellant must proceed against Appellee rather than against the real parties in interest, and on the other hand, that Appellee is an agent of a court of the State, thus attempting to bring the case within the prohibition of Section 265.

As was said by Mr. Justice Harlan in *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S., 239, 253, after stating that the judicial power of the United States extended to all suits involving controversies between citizens of different States:

“A State cannot by any statutory provisions withdraw from the cognizance of the federal courts a suit or judicial proceeding in which there is such a controversy, otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different States would thereby be defeated.”

See a synopsis of this decision and further quotations from the opinion in the Appendix, pages 49-52.

By reason of the construction placed by the courts of Indiana upon the Drainage Act—to the effect that the drainage commissioner is an agent of the court, and stands for the original petitioning landowners in the drainage proceeding, and can alone be sued in a collateral attack upon the validity of the decree establishing the ditch,—the State of Indiana will have restricted the equitable jurisdiction

of the courts of the United States conferred by the Constitution and the Statutes of the United States, *if this Court shall hold that Appellant may not maintain its bill against Appellee because of Section 265*. We respectfully submit that this Court should not so hold, but on the contrary, should hold that Appellee, in performing his duties in constructing the ditch, represents and stands for the original petitioning landowners in the drainage proceeding for whose benefit the ditch will be constructed, and should therefor be enjoined from executing such construction under the principles established in the *Simons'* case.

\* \* \* \*

Counsel for Appellee may contend that since the Circuit Court of Porter County has taken jurisdiction of the subject matter of this drainage ditch, it should retain jurisdiction of the entire subject matter to the exclusion of every other court until its duty is fully performed and the jurisdiction involved is exhausted.

The answer to this contention is found in the fact that the Circuit Court of Porter County is not now and never has had jurisdiction over Appellant, nor can it acquire jurisdiction over Appellant without its consent, since Appellant is a nonresident of the State of Indiana and its property affected by the proposed Burns Ditch is located outside of the State of Indiana, and the Drainage Act provides no machinery for adjudicating the rights of the owner of property outside of the State. The issue in the drainage proceeding was not the issue presented in the court below.

In *McCollum v. Uhl*, 128 Ind., 304, 27 N. E., 152, a collateral proceeding to enjoin the collection of a ditch assessment, the Supreme Court of Indiana held that the owner of land affected by a proposed drainage *who was*

not made a party to the drainage proceeding would not be bound by the order establishing the drainage and could attack it collaterally.

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362, suit was brought against the railroad commissioners of Texas to enjoin the enforcement of unreasonable rates. In delivering the opinion of the court, Mr. Justice Brewer said (391):

"Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts. *Cowles v. Mercer County*, 7 Wall. 118; *Lincoln County v. Luning*, 133 U. S., 529; *Chicot County v. Sherwood*, 148 U. S., 529."

See, also:

*Smyth v. Ames*, 169 U. S., 466, 516-17.

In *Colorado Eastern R. R. Co. v. Chicago, Burlington & Quincy Ry. Co.*, 141 Fed., 898 (C. C. A. 8th Circuit), the Burlington Company filed in a federal court its bill to enjoin the Colorado Company from instituting proceedings against complainant in the State court to condemn land belonging to complainant and used by it for railroad purposes. At the time the bill was filed a proceeding to condemn had already been instituted in the State court by the defendant against the apparent owner of record of the land in ques-

tion, although complainant was not itself a party defendant. The Court of Appeals for the Eighth Circuit held that Section 720 did not forbid the federal court enjoining such condemnation proceeding, *as complainant was not a party defendant in that proceeding*, and that Section 720 had no application "for the palpable reason that no jurisdiction was obtained of the subject or of the parties involved in the bill of complaint." Phillips, District Judge, in delivering the opinion of the Court said (902):

"The bill of complaint does not disclose that any such condemnation proceeding had been instituted against the complainant, but the allegation is that the defendant threatens to begin such proceeding. The affidavits and the record presented by the defendant at the hearing only disclose the fact that in the month of March, 1905, just preceding the month in which the bill of complaint was filed, the defendant instituted such condemnation proceeding against the Burlington & Colorado Company, the apparent owner of record. This complainant was not named as a party defendant or served with any notice or process therein. This being conceded, the proceeding instituted in the state court, as to the complainant, was clearly *res inter alios acta*; and therefore, the provision of said Section 720 has no application, for the palpable reason that no jurisdiction was obtained of the subject or the parties involved in the bill of complaint."

Not having been a party to the drainage proceeding Appellant could have attacked it collaterally in the State court, and since the necessary diversity of citizenship and jurisdictional amount exist, and constitutional questions are raised, it has the same right to attack the decree in a court of the United States.

\* \* \* \*

Counsel for Appellee may further contend that Appellant should not be permitted to arrest the construction of the ditch by injunction while refusing to submit to

the jurisdiction of the Circuit Court of Porter County which has authority over the construction of the ditch. It is possible that under Section 8 of the Drainage Act (Appendix, pp. 34, 71-72.) Appellant would have the right to file a supplemental petition in the drainage proceeding and there raise the issues presented by its bill in the court below; but it is doubtful whether a court of Indiana can compel property owners in Indiana benefited by the proposed ditch to pay the damages sustained to property of a nonresident located outside of the State. Irrespective of its right to voluntarily appear in and to become a party to the drainage proceeding, Appellant, by virtue of the diversity of citizenship in this case and the jurisdictional amount involved, and the existence of constitutional questions, is entitled to have its rights adjudicated in a federal court, subject to the restrictions contained in Section 265. This Court has held that "one who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

*Smyth v. Ames*, 169 U. S., 466.

The rule seems to be well established by the decisions of this Court that Appellee, although an agent of the State of Indiana, may be enjoined from constructing the Burns' Ditch, if such action on his part will deprive Appellant of rights protected by the Constitution of the United States.

*Ex parte Young*, 209 U. S., 123, 150, 155.

*Smyth v. Ames*, 169 U. S., 466, 518-519.

*Greene v. Louisville & Interurban R. R. Co.*, 244 U. S., 499, 506-507.

In conclusion, we again emphasize the fact that Appellant is a citizen of the State of Illinois, is engaged in business in that State, and its property which will be damaged by the construction and operation of the proposed ditch is located in that State. Appellant is not amenable to the laws of Indiana, is not subject to the process of the courts of that State, at least with respect to its property located outside of that State, and it cannot be compelled by Indiana legislation to litigate in the courts of Indiana any rights in property located outside of that State. The ditch is to be constructed by a citizen of Indiana, in whatsoever capacity he may act.

The courts of the United States were created for the very purpose of affording relief to a litigant in such a situation as exists in this case. To hold that Section 265, which admittedly relates only to judicial proceedings, prevents a court of the United States from granting the relief sought in this case would be giving to that Section an interpretation entirely at variance with the interpretation previously adopted by this Court.

We respectfully submit that the District Court erred in dismissing the bill for want of jurisdiction and that its decree should be reversed and the case remanded for further proceedings.

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